Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
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Level 3 Communications' Petition for Declaratory Ruling That Certain Right-of-Way Rents Imposed by the New York State Thruway Authority are Preempted Under Section 253	)	**WC Docket No. 09-153**
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COMMENTS OF
AMERICAN FIBER SYSTEMS, INC.

American Fiber Systems, Inc. ("AFS") files these comments in response to the petition ("the Petition") filed by Level 3 Communications, LLC ("Level 3")[1] seeking a declaratory ruling from the Federal Communications Commission ("FCC" or "Commission") preempting certain rent provisions imposed on Level 3 by the New York State Thruway Association ("NYSTA") for access to rights-of-way necessary to install a fiber optic network for the provision of broadband and telecommunications services.

AFS submits that the Petition is inextricably linked to the Commission's ongoing efforts to establish a National Broadband Plan in that core infrastructure costs -- such as rights-of-way fees - can significantly impair (and in the case of the NYSTA rents do impair) the ability of carriers to deploy the middle mile facilities required to bring broadband services to consumers, particularly

[1] Public Notice, *Wireline Competition Bureau Seeks Comment on Level 3 Communications' Petition for Declaratory Ruling That Certain Right-of-Way Rents Imposed by the New York State Thruway Authority are Preempted Under Section 253*, DA 09-1878, WC Docket No. 09-153 (Released Aug. 25, 2009).

those in rural areas, which in turn creates a conflict with the goal of Section 706 of the Telecommunications Act of 1996 ("1996 Act"), which is to further the deployment of advanced communications services. As such, pursuant to Section 253(d) of the 1996 Act, and in concert with the provisions of Section 706, the Commission is required to preempt such rate provisions.

I. Rental Fee a Disincentive to Expand Networks and Thus Provide New or Added Telecommunications and Broadband Services

The Level 3 Petition notes that costs imposed on telecommunications carriers for rights-of-way can materially impair a carrier's ability to expand existing network infrastructure and by doing so create a disincentive to provide telecommunications service, including broadband services in new markets. AFS conurrs and believes that there is a large and diverse body of evidence in numerous proceedings that details how exorbitant costs associated with access to essential infrastructure, such as rights of-way, have a negative impact on broadband deployment.[2] Exorbitant and ongoing rents and demands for in kind contribution of fibers or conduit increase the difficulty of developing an economically sustainable middle mile broadband project into rural areas.

A direct result of these formidable infrastructure-access costs, such as those being charged by NYSTA, is that all manner of communities - whether urban, rural or suburban - will remain unserved or underserved by being effectively barred from access to broadband deployment.

Level 3 has made clear in their petition that there is no demonstrable correlation between NYSTA's rental rates and the cost of maintaining the right-of-way. Nor has NYSTA undertaken a cost study or market-value appraisal to support the rents it charges Level 3.

[2] Earlier this year, the Commission concluded that "[t]imely and reasonably priced access to poles and rights of way is critical to the buildout of broadband infrastructure in rural areas." *See* FCC Report, *Rural America, Report on a Rural Broadband Strategy*, May 22, 2009

Further NYSTA's rents have no connection to NYSTA's costs related to any particular right-of-way, nor do they relate to the right-of-way distances actually utilized by Level 3. Indeed, the rents are completely divorced from the width, breadth, or any physical characteristics of the rights-of-way.

By imposing on Level 3 arbitrary and financially unsupportable costs, NYSTA has effectively barred that carrier from deploying the infrastructure necessary to provide telecommunications services to many communities along the 400+ mile length of the New York State Thruway, including the deployment of those middle-mile facilities necessary to offer broadband, either directly to the public or to other carriers providing such service offerings to communities outside of urban areas.

Throughout the broadband stimulus hearings held by the FCC, the National Telecommunications and Information Administration, and the Rural Utility Service, speakers repeatedly highlighted the lack of high-speed-fiber middle-mile connections to the national fiber backbones that connect America. *See* Rural Utilities Service (Department of Agriculture) and National Telecommunications and Information Administration (Department of Commerce), Notice of Funds Availability and Solicitation of Applications, 74 Fed. Reg. 33104, 33112 (§ V.D.2.b.i.) (2009). The exorbitant right-of-way rents charged by NYSTA directly create a barrier to entry by adding recurring costs that make it economically unfeasible to deploy new fiber facilities, even when stimulus funds are available to support the one time infrastructure investments.

II. The Commission Should Preempt NYSTA's Right-of-Way Rental Requirements

A. NYSTA's Rents Violate Section 253(a)

Pursuant to Section 253(a) of thee 1996 Act, "No State or local statute or regulation, or other

State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. § 253(a). Further, Section 253(d) of the 1996 Act provides, "If, after notice and opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation or legal requirement to the extent necessary to correct such violation or inconsistency." 47 U.S.C. §253(d).

Although NYSTA's practices do not explicitly prohibit the provision of telecommunications services, NYSTA's rents do have the effect of prohibiting the ability of Level 3 to provide interstate or intrastate telecommunications services by increasing the costs of providing these services to such a degree that Level 3 finds it economically prohibitive to serve the communities along and off the New York State Thruway.

Further, "[I]n determining whether an ordinance has the effect of prohibiting the provision of telecommunications services, [the Commission] considers whether the ordinance materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment. *TCG,* 305 F.3d at 76 (citing *Cal. Payphone Ass 'n Petition,* Mem. Op. & Order, 12 FCC Rcd 14,191, 14,206 ~31 (1997)) *see also Pub. Utility Commission of Tex.,* Mem. Op. & Order, ¶ 3 FCC Rcd 3460, 3463 ¶ 3. "[A] prohibition does not need to be complete or insurmountable to run afoul of § 253(a) *TCG,* 305 F.3d at 76 (internal quotation marks omitted). Rather, a requirement that "material[ly] interfere[s]" with a carrier's ability to compete violates subsection (a). *Level* 3 *Commc'ns.,* 477 F.3d at 533; *see also Qwest Corp. v. City of Santa Fe,* 380 F.3d 1258, 1271 (10th Cir. 2004) ("[A]n absolute bar on the provision of services is not required. It is enough that the [regulation] would 'materially inhibit' the provision of services."). The onerous rents NYSTA has imposed on Level 3 clearly meet these

standards by effectively prohibiting Level 3's ability to compete in a fair and balanced legal and regulatory environment.

Under 47 U.S.C. §253(c), States or local authorities may "manage the public rights-of-way" and "require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government." . Neither of these provisions are applicable to NYSTA's rents.

As the statute makes clear, the Commission must consider not only whether a requirement violates subsection (a), but must also assess whether the disputed requirement falls into either of the safe harbors. Thus, part of the Commission's task is to determine whether either safe harbor applies. Thus, if a state requirement violates the standard identified in subsection (a) and does not fall within the safe harbors in subsections (b) or (c), then the Commission has a nondiscretionary obligation to preempt. *See* 47 U.S.C. § 253(d) (providing that the Commission "shall" preempt in this circumstance); *see also Petition of the State of Minnesota,* 14 FCC Rcd at 21,704 ¶ 11 (stating that if a regulation violates Section 253(a), "the Commission *must* preempt it unless [it] comes within the terms of the exceptions Congress carved out in sections 253(b) and (c)") (emphasis added).

B. NYSTA's Rents Do Not Fall Within the Section 253(b) Safe Harbor

Section 253(b) preserves the ability of States and local governments "to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to[i] preserve and advance universal service, [ii] protect the public safety and welfare, [iii] ensure the continued quality of telecommunications services, and [iv] safeguard the rights of

consumers." 47 U.S.C. § 253(b) (alterations added). The burden of showing that Section 253(b) applies falls on the party claiming the safe harbor. *See, e.g., Petition of the State of Minnesota,* 14 FCC Rcd at 21,704, n.26; *see also Level* 3 *Commc 'ns., 477* F.3d at 532; *Guayanilla,* 450 F.3d at 21; *N.J Payphone Ass'n,* 299 F.3d at 240 35 To qualify for the Section 253(b) safe harbor, a state or local requirement must be (1) necessary to achieve one of the four enumerated purposes, (2) competitively neutral, and (3) consistent with section 254 (which provides for the preservation and advancement of universal service). *See W. Wireless Corp. Petition for Preemption of an Order of the S.D. Pub. Utils. Comm 'n,* Decl.. Ruling, 15 FCC Rcd. 15,168, 15,171 ¶17 (2000).

Far from achieving any of the four purposes enumerated in Section 253(b), NYSTA's rent requirements effectively undermine each of those goals. First, the rents are not in any respect necessary to preserve and advance universal service. To the contrary, they effectually retard universal service by creating a pronounced disincentive to extend service to additional consumers. Second, the rents, far from being intended to protect public safety and welfare are simply a random revenue-generating mechanism on NYSTA's part. Third, the rents undermine the goal of preserving the quality of communications services by preventing Level 3 from providing advanced telecommunications and broadband services. And, fourth, in no conceivable manner do the rents safeguard consumers' rights. In reality they achieve the opposite result by negating Level 3's ability to provide additional and advanced services to customers along the New York State Thruway. Neither are the rents competitively neutral. Indeed, NYSTA's rents favor some carriers over others and serve rather to encourage the disadvantaged carriers to lease circuits from incumbent network providers rather than utilizing their own more efficient facilities, thereby completely frustrating the pro-competitive, de-regulatory framework that Congress sought to establish through the 1996 Act.

For all of these reasons, NYSTA can not claim a "safe harbor" for its rents under the umbrella of Section 253(b).

C. NYSTA's Rents Do Not Fall Within the Section 253(c) Safe Harbor

In order to be saved by Section 253(c), a State or local government requirement requiring compensation must be "fair and reasonable" and "competitively neutral and nondiscriminatory." 47 U.S.C. § 253(c). A State or local government requirement that fails to satisfy either of these criteria does not qualify for the safe harbor,

See id. As with Section 253(b), the burden under Section 253(c) falls on the party asserting that the safe harbor applies. *See, e.g., Petition ofthe State ofMinnesota,* 14 FCC Rcd at 21,704, n.26; *see also Level 3 Commc 'ns.,* 477 F.3d at 532; *Guayanilla,* 450 F.3d at 21; *NJ Payphone Ass 'n,* 299 F.3d at 240. Factors used to determine whether compensation is "fair and reasonable" include "the extent of the use contemplated, the amount other telecommunications providers would be willing to pay, and the impact on the profitability of the business." *Qwest Corp.,* 380 F.3d at 1272 (adopting factors considered in *TCG Detroit* v. *City of Dearborn,* 206 F.3d 618, 625 (6th Cir. 2000)). In addition, "fees should be, at the very least, *related* to the actual use of rights of way," and "the costs [of maintaining those rights of way] are an essential part of the equation." *Guayanilla,* 450 F.3d at 22. NYSTA's right-of-way fees are at best arbitrary with no discernible relationship to their maintenance costs.

AFS thus submits that NYSTA's rents violate Section 253(a) and that neither of the narrow safe harbors identified in Sections 253(b) and (c) applies. In particular, rents, which by Level 3's Petition range from $78 to over $34,000 per linear foot per year, are so excessive, inconsistent and un-connected to prevailing market rates or the cost of maintaining the right-of-way, that they cannot logically be classified as fair and reasonable.

III. Conclusion

For the foregoing reasons, and most importantly to aid the Commission and the tele-communications industry in advancing the goals of Section 706 - which directs the Commission to further the deployment of advanced communications services- AFS fully supports the Level 3 Petition and respectfully requests the Commission to issue a declaratory ruling preempting the rent provisions imposed by NYSTA.

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